Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

DANNY D. SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
Supreme Court of Kansas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. **Whether the State may avoid its due process responsibility under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), to disclose an agreement for leniency extended to a prosecution witness by deferring final agreement with the witness until after the witness has testified and, further, whtehr the appellate court may deny such a *Brady* claim on the basis of insufficient evidence while also failing to remand the case for an evidentiary hearing?**

2. **Whether the State may obtain, over a confrontation clause objection ,the admission of the out-of-court statements of an alleged accomplice pertaining to an agreement to pay a bribe on the basis that the statements are not relevant to the truth of the matter asserted, when the statements are in fact relevant for no other purpose and the prosecutor argued that the statement showed the defendant's guilt?**

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The June 8, 2001, Opinion of the Kansas Supreme Court affirming Petitioner Smith's conviction is reported at *Smith v. United States*, 24 P.3d 727 (2001). The Kansas Supreme Court's Opinion is included in Petitioner's Appendix, along with that Court's Order denying Petitioner's Motion for Rehearing.

JURISDICTIONAL STATEMENT

The Kansas Supreme Court issued its Opinion on June 8, 2001. It issued its Order denying Mr. Smith's Motion for Rehearing on July 12, 2001. Under United States Supreme Court Rule 13.1, this Petition for Writ of Certiorari is timely filed within the ninety (90) day period running from the denial of rehearing. The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V to the Constitution of the United States is as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI to the Constitution of the United States is as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of his Counsel for his defense.

Amendment XIV to the Constitution of the United States is as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Danny D. Smith was convicted of murder in the second degree/intentional and attempted murder in the second degree/intentional following a four-day jury trial. Mr. Smith unsuccessfully appealed his conviction to the Kansas Supreme Court. On appeal, Mr. Smith had raised numerous claims, including the failure of the State to disclose a "secret deal" with the only witness who linked Mr. Smith to the shooting, and the improper admission of the hearsay statements of Mr. Smith's former attorney who was alleged to have tampered with a witness by arranging a bribe.

Mr. Smith was charged on September 24, 1997, with one count of second-degree murder in the shooting death of Julie Garrett. Four months later, the State filed an amended information charging Mr. Smith with one count of first-degree murder and one count of attempted first-degree murder.

In August 1998, the preliminary hearing was held, and Mr. Smith was bound over for trial. At the hearing, the State's primary witness, Michael Wilson, testified that Mr. Smith was *not* the individual he had seen shoot Ms. Garrett from a moving vehicle. Mr. Wilson had previously identified Mr. Smith in a photographic line up.

In November 1998, Mr. Smith appeared before the district court for trial. A jury was selected and sworn in. After the jury was sent home for the day, the court heard statements from counsel regarding the anticipated testimony of Mr. Wilson. The State informed the court that Mr. Wilson would testify that he failed to identify Mr. Smith at the preliminary hearing because he had been paid to change his testimony by Mr. Smith's attorney, Rosie Quinn. The court heard testimony from Mr. Wilson the following day at a hearing outside the presence of the jury. Mr. Wilson testified that Ms. Quinn entered into an agreement with him to alter his testimony. He was to be paid $5,000.00. Mr. Wilson revealed the alleged deal with Ms. Quinn after he was twice arrested in two separate drug incidents following Mr. Smith's preliminary hearing.

Mr. Smith later obtained new counsel. The district court denied a motion in limine to exclude Ms. Quinn's alleged hearsay statements.

Mr. Smith again appeared for trial in May 1999. After a four-day trial, including two days of deliberations, the jury convicted Mr. Smith of second degree murder/intentional and attempted second degree murder/intentional. The district court denied the Defendant's Motion for a New Trial.

Mr. Smith then appealed to the Kansas Supreme Court, which affirmed his conviction on June 8, 2001. The Kansas Supreme Court later denied Mr. Smith's Motion for Rehearing on July 12, 2001.

FACTUAL HISTORY

During the evening of September 16, 1997, Michael Wilson was standing with a friend, Julie Garrett, behind a small pick-up truck near a corner in Kansas City, Kansas. Wilson and Garrett, who were both regular crack cocaine users were waiting in front of a "drug house" where people came to use crack cocaine or other drugs.

Wilson noticed a peach or wine-colored van approaching the area where he was standing with Garrett. Wilson and neighbors Beulah, Natividad and Tommy McGaughy then heard gun shots. Wilson later stated that gun fire came from the van. Wilson allegedly heard Ms. Garrett say, "I'm hit." Wilson then looked at the van. At trial, he later testified that he saw a black man whom he recognized driving the van. Wilson identified the man as "Dino." Wilson testified that he saw no one else in the van and that the driver was pointing his gun through the open sliding door of the van. Natividad, the

neighbor, could not see anyone in the van, but heard approximately seven gun shots. Right after the first three shots, she heard a female voice scream, "Dino" or "Tino."

Tommy McGaughy, the other neighbor, heard several shots and saw a red mini van heading east. McGaughy described the individual as "bright complected," and stated he "could have been black, [he] could have been Hispanic." McGaughy was unable to further identify the driver.

Michael Wilson gave a statement to police the night of the shooting. He identified the shooter as "Dino" but told the police he had no prior problems with him. Wilson also told police he did not know whether Dino sold illegal drugs. At trial, Wilson testified that the statements were not true. He stated that he lied because he "didn't want any trouble" to happen to him for buying drugs and carrying a pistol.

Although Wilson later told police he had lied about his prior dealings with Dino, the State offered him a deal to testify against Mr. Smith. Wilson contacted the prosecutor about two months after the shooting because he was having "some problems" with criminal charges, including felony possession of firearms. He also was charged with aggravated

failure to appear and was, at that time, on probation for either attempted battery or attempted robbery. As part of the deal, the State agreed to dismiss the firearms charge and allow Wilson to plead no contest to the aggravated failure to appear charge. The State agreed to recommend probation on the aggravated failure to appear charge and also agreed not to seek revocation of Wilson's probation on the attempted robbery charge. Further, the State agreed not to prosecute Wilson for any crimes he may have committed against Mr. Smith.

In return for the promises extended to Wilson, the State's agreement required Wilson to testify to a particular version of events - - identifying the shooter as "Dino Smith," describing his earlier robbery of Smith, and identifying Smith as the shooter in the van.

Several months after executing the plea agreement, Wilson testified at Smith's preliminary hearing. At that hearing he stated that the individual he saw shooting from the van was *not* the Defendant. Wilson acknowledged at the hearing that he had previously picked out the Defendant as "Dino" from the video or photographic at line up. However, Wilson testified at the preliminary hearing that the shooter was not Mr. Smith because the man he had previously identified "should be shorter and heavier

across the shoulders." After the preliminary hearing, Wilson was arrested on two new, separate cocaine cases. After the second arrest, and while detained, Wilson sent a note to the prosecutor and his attorney indicating he wanted to cooperate with the State. Wilson told the prosecutor that he "had lied" and that "he wanted to make it right."

At the request of prosecutors, Wilson took a "lie detector" test and was told that he passed. Also at the prosecutor's request Wilson agreed to wear a "wire" so he could attempt to elicit incriminating statements from Mr. Smith during a church service in the jail. The tape was made, but the district court excluded the tape as evidence because it violated the Sixth Amendment right to counsel.

After the jury was selected in Mr. Smith's trial in November 1998, the district court declared a mistrial upon learning that Wilson would testify that Smith's then-attorney, Rosie Quinn, had allegedly arranged for the payment of money to Wilson. The court held a hearing outside the presence of the jury in which Wilson testified. Wilson told the court that he and Quinn agreed that he would be paid $5,000.00

to testify at the preliminary hearing that Smith was not the shooter.[1]

Smith's trial eventually was held in May 1999. At that point, he was represented by new counsel. Through her attorney, Quinn invoked the Fifth Amendment and did not testify for either side. The defense moved, unsuccessfully, to have Wilson's testimony as to Quinn's out-of-court statements excluded on the basis that they were hearsay and also violated the Defendant's constitutional right to confrontation.

During the trial, Mr. Wilson testified that he viewed the shooter drive the van down the street and that he recognized the shooter as "Dino." He also testified that he had previously robbed Dino and that he had pointed a gun at Dino. Wilson testified that he falsely denied Dino was the shooter at the preliminary hearing because he had been paid to change his testimony. At trial, Wilson stated that he made the deal for payment at Quinn's office and that they had communicated with each other by writing on tablets. Wilson testified that he was to be paid $5,000.00 for his testimony if Smith was bound over for trial and $7,500.00 if he was not.

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[1] Quinn was never charged with any offense.

Wilson also stated that after his second arrest following the preliminary hearing, his probation was revoked on the aggravated failure to appear charge and he was sentenced to jail for eleven months. Wilson testified that he received no additional deals or leniency from the State regarding his two new charges for cocaine possession. The only deal was the initial deal that allowed him to plead to the charge of aggravated failure to appear and receive a recommendation for probation in return for his testimony that "Dino" Smith was the shooter. It was that probation which was revoked following his second cocaine arrest.

During direct examination, Mr. Wilson stated he had not been offered or negotiated any kind of deal regarding his new cocaine cases. He also testified during direct that he did not expect to get a deal after the case was over. During cross-examination Wilson agreed that his testimony against Smith "might" help him in his cocaine cases. However, during re-direct, Wilson testified he had not been offered any new deal whatsoever.

Wilson's testimony as to the lack of a deal was cited by the prosecutor in closing. Significantly, the most direct statement about the supposed lack of a deal was made by the trial court to the jury after

conferring with counsel. When the prosecutor objected to defense counsel's opening statement, the trial court informed the jury after a bench conference: "It's my understanding that no new deal was brokered between the State and Mr. Wilson after the preliminary hearing." Thus, the question of whether a new deal existed was effectively removed from the jury's consideration.

Two months after Mr. Smith's trial, Michael Wilson appeared in a different district courtroom and pled guilty to one of two cocaine possession charges he incurred after Smith's preliminary hearing. In return for Wilson's plea of guilty, the State agreed to dismiss the other cocaine charge and to recommend a "dispositional departure" to probation. Three months after Smith's trial, on August 11, 1999, the court sentenced Wilson to probation after making a finding that Wilson's proper sentencing range was sixty-five to seventy-two months. At sentencing, the prosecutor represented that he had agreed to recommend probation for Wilson as part of a plea agreement because Wilson was a key witness in a murder trial and had provided substantial assistance to the State. The prosecutor then stated that Wilson had come forward and had "cooperated fully with the State," which included agreeing to the State's demands for a "lie detector test and things like that."

The prosecutor stated that Wilson went "above and beyond" what he had to do to "remedy" his improper actions at Smith's preliminary hearing. The court sentenced Wilson to sixty-eight months, then departed to a sentence of thirty-six months probation.

On appeal, Mr. Smith included in the record the transcripts of Mr. Wilson's plea and sentencing. He asserted that there were sufficient facts from which the court could find that Mr. Wilson was testifying pursuant to the terms of a deal or agreement. Alternatively, Mr. Smith asserted that if the facts were not sufficient to establish the existence of a deal or agreement at the time of Smith's trial, that the appellate court should evidentiary hearing on this issue. In the appeal, the Kansas Supreme Court concluded that the record "[did] not support a new deal with Wilson arising from his cocaine charges in exchange for his testimony." The Kansas Supreme Court stated that it appeared that Wilson came forward on his own and testified "in the hopes of obtaining leniency in the future." The appellate court further concluded that "there is no evidence that [Wilson] reached a new agreement with the State to obtain leniency before trial."

REASONS FOR GRANTING THE WRIT

I.

THE STATE VIOLATED MR. SMITH'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS BY FAILING TO DISCLOSE MATERIAL EVIDENCE THAT WOULD HAVE IMPEACHED THE STATE'S PRIMARY WITNESS BY REVEALING THAT HE RECEIVED LENIENCY IN EXCHANGE FOR HIS TESTIMONY.

On appeal, the Kansas Supreme Court agreed that "evidence of an agreement with the State to dismiss a charge against a prosecution witness and to recommend probation in exchange for the witness's testimony" would be the type of evidence that "must be disclosed to a Defendant." The Court further agreed that "if there was a second deal between Wilson and the State, there is no question but that the evidence would be exculpatory." Because the evidence bore on the credibility of Wilson, the key witness, it would also be "material." The appellate

court concluded, however, that the record did not show "a new deal with Wilson arising from his cocaine charges in exchange for his testimony." Mr. Smith asserts: (1) that the court's conclusion was incorrect; (2) that, as a matter of law, the State should not be able to avoid its obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), it is clear the record indicates the existence of an agreement or understanding with the witness and the State contemplates the possibility of extending leniency in the future exchange for testimony; and (3) in the alternative, if the court felt the evidence was insufficient to establish the existence of a deal, the proper remedy would be to grant a remand to the district court for the purpose of holding an evidentiary hearing. See *DeMarco v. United States*, 415 U.S. 449 (1974) (proper procedure to determine if deal existed is to remand for a hearing).

The Kansas Supreme Court erred in holding that no new deal was brokered between the State and Mr. Wilson. The appellate court ignored dispositive facts and misconstrued portions of the record.

Mr. Wilson's credibility was, to a large degree, the only real issue at Mr. Smith's trial, and his credibility was severely in doubt. Mr. Wilson was a witness who repeatedly changed his story. His

motivations for testifying were never clear. Although the prosecutor told the jury that Wilson was testifying for the State as a condition of the *original* agreement with the State made before the preliminary hearing, Mr. Wilson himself stated that he was *not* testifying for the State because of the "old deal."

Significantly, the appellate court acknowledged, but did not discuss, the statement by the prosecutor to the court during a bench conference that: "There has been no new deal *and there will not be any deal*." (Emphasis added). Thus, the State not only told the district court that no new deal had been made up to that point, but also that there would be no deal *in the future*. It was under this representation that the district court then concluded that there was "no new deal" between the State and Mr. Wilson. At that point, the district court in essence made a factual finding and informed the jury that it was its "understanding that no new deal was brokered between the State and Mr. Wilson after the preliminary hearing." In making this finding and in so informing the jury, the district court thereby removed from the jury's consideration a critical part of the case concerning Mr. Wilson's credibility. The Kansas Supreme Court completely failed to acknowledge this improper instruction, which

certainly had the effect of compounding the prejudicial impact of Mr. Wilson's testimony.

Despite the State's representations, the record in this case suggested the State and Mr. Wilson were working together cooperatively throughout the pendency of Mr. Smith's case. Although Mr. Wilson was arrested on the two cocaine charges soon after the preliminary hearing in August 1998, he did not plead guilty until July 1999 (eleven months later), and he was not sentenced until August 1999. It is no coincidence that Mr. Wilson did not plead guilty until two months *after* Smith's trial. The State obviously sought to secure Wilson's cooperation and Wilson sought to secure leniency. Although the understanding or agreement between the State and Mr. Wilson may not have been in writing or otherwise stated in formal terms, it is clear that there was a cooperative arrangement and that this arrangement could reasonably be inferred to be a "deal."

The comments of the prosecutor at Mr. Wilson's sentencing suggests that the cooperative understanding (or deal) had existed *before* the time of Mr. Smith's trial. As the district court acknowledged at Mr. Wilson's sentencing, Mr. Wilson received "one very large break" on his pending drug cases by

obtaining a sentence of probation. At the sentencing, the prosecutor explained the basis for the deal with Mr. Wilson:

> Prosecutor: Well, Judge, as you probably remember, I was quite upset with Mr. Wilson and his actions on that day [at the preliminary hearing] as well. He picked up - - he was picked up on new charges, Judge, and at that time I had no real interest in speaking with Mr. Wilson, dealing with him whatsoever. He persisted through his attorney to contact me and came forward with this information, Judge. *And at the time I don't think he was acting solely because of the - - the cases that are pending against him, but he did at that point cooperate fully with the State. He conceded with all of our demands of a lie detector test and things like that. He did things for the State such as discuss with one of the criminal defendants the circumstance . . . .*

The comments of the prosecutor at sentencing clearly suggests that the State was working hand-in-glove with Mr. Wilson throughout the pendency of

the case against Mr. Smith. The prosecutor's comments are revealing. He states that Mr. Wilson was not "acting *solely*" because of the new charges against him, suggesting that Wilson was acting, at least in part, because of those charges. The prosecutor also added that Mr. Wilson went above and beyond "what he had to do to remedy" his past misconduct. The prosecutor's comments do suggest that Mr. Wilson had an obligation to the State and that the State was holding out the carrot of leniency. *This clearly amounts to a deal.* If the State and the witness have any kind of implicit or implied understanding, regardless of whether it is reduced to writing, it qualifies as a "deal" for the purpose of *Brady v. Maryland*, 373 U.S. 83 (1963). *See also Giglio v. United States*, 405 U.S. 150 (1972).

The requirement to disclose exculpatory and impeaching information is rooted in the due process clause as interpreted in *Brady* and *Giglio*. The failure to disclose this information violated Mr. Smith's rights to due process and fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. This Court most recently addressed the demands of the due process clause in *Strickler v. Greene*, 119 S.Ct. 1936 (1999). In *Strickler*, this Court hewed to precedent in describing the prosecution's obligations under *Brady* and its

progeny. In *Strickler*, this Court reiterated that the duty to disclose evidence favorable to an accused "encompasses impeachment evidence as well as exculpatory evidence." *Id.* at 1948. The evidence must be disclosed if it is "material" to guilt or innocence or to the credibility of a witness. *Id.* Such evidence is material if "there is a reasonable probability, that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler*, 119 S.Ct. at 1948.

In *Giglio*, this Court made clear that the *Brady* rule imposes on the prosecutor a constitutional duty to disclose "evidence of any understanding or agreement as to future prosecution" relating to any of its witnesses." *Giglio*, 405 U.S. at 154 - 55; *see also DeMarco*, 415 U.S. at 450. This constitutional duty assumes even greater importance when the "reliability of a given witness may well be determinative of guilt or innocence." *Id.* at 154 (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

Two recent cases from state appellate courts demonstrate that even if the terms of a plea agreement are not finalized at the time the witness testifies against the defendant, that the lack of finality or formality "does not alleviate the State's obligation

to disclose the material evidence." *See, Wilson v. State*, 2001 Westlaw 233383 (MD 2001). The Maryland court of appeals in *Wilson* observed that a "tentative plea bargain" can be "even more probative of a witness's motivations in testifying than a finalized agreement because it may be more likely that the witness will perceive that the agreement is contingent upon his or her performance on the stand." *Id.* The Maryland Court of Appeals further found that the cross-examination of the witness regarding inducement to testify does not substitute for adequate disclosure of the agreement.

In *Commonwealth v. DeCicco*, 51 Mass.App.Ct. 159, 744 N.E.2d 95 (Mass.Ct.App. 2001), the Massachusetts Court of Appeals criticized a prosecutor's tactic of bolstering the reliability of an untried cooperating witness by arguing to jurors that no deal would be made with the witness. "A reasonable juror, conscientiously attempting to weigh [the witness's] credibility would have assumed that the prosecutor's disclaimer of any inducement offer was unassailable. Thus, the jury was left with the impression that [the witness] had nothing to gain by his testimony." 744 N.E.2d at 98. Although the court found that there was substantial other evidence against the defendant, it strongly criticized the tactic

employed by the prosecutor, which it referred to as "questionable" and "troublesome."

Mr. Smith asserts that these two state court cases, which follow established Supreme Court precedent as stated in *Brady*, *Giglio*, and *Strickler*, are highly relevant to the issue before the court in this case. In the present case, the jury was denied the opportunity to thoroughly assess Mr. Wilson's credibility because it was informed by the trial court that "no new deal was brokered between the State and Mr. Wilson after the preliminary hearing." The court's improper instruction was based on representations made to the court by the prosecutor that there was no new deal and that there would be no new deal in the future. In closing argument, the prosecutor also argued to the jury that there was no new deal and the defense failed to prove otherwise. These statements to the jury, along with the statements of Mr. Wilson denying the existence of any deal or understanding, removed critical evidence from the consideration of the jury and had the effect of enhancing the credibility of the only witness who linked Mr. Smith to the shooting of Julie Garrett.

Certainly, in light of the ongoing cooperation offered by Mr. Wilson, and the ongoing demands on Mr. Wilson by the State, it should have been

acknowledged by the prosecutor that a cooperative understanding existed and that there certainly could be an explicit deal arranged before Mr. Wilson's sentencing. The prosecutor's statement to the court that there would be no new deal was therefore misleading.

Although Mr. Wilson testified at trial that he did not receive a deal and did not expect to receive a deal on his two pending cocaine cases, the transcript of his sentencing in August 1999 suggests that he endeavored almost immediately after his second cocaine arrest to curry favor with the State. While his two new cases may not have been his *sole* reason for cooperating, one may reasonably infer that they were certainly a very strong factor.

There was substantial evidence in the record from which the Kansas Supreme Court could have concluded that an agreement, whether formal or informal, existed between the State and Mr. Wilson regarding his cooperation against Mr. Smith. If the Kansas Supreme Court felt that the evidence was conflicting or not substantial enough, the proper remedy was to remand the case for further proceedings, as argued by Mr. Smith in his brief on appeal. *See DeMarco*, 415 U.S. at 450.

Mr. Wilson's credibility was the central and overriding issue in Mr. Smith's case. The jury was deprived of a fair opportunity to determine his credibility when evidence of a deal extended to him on his new charges was not presented. The prejudicial impact of this testimony was compounded by the trial court's statement to the jury that it was the court's understanding that no new deal was brokered between the State and Mr. Wilson after the preliminary hearing. The trial court made in essence, a factual finding and presented it to the jury.

Under all of these circumstances, relief is mandated. The clear legal question presented is whether the State may avoid its obligations under *Brady* and *Giglio* to disclose a tacit agreement for leniency extended to a prosecution witness by deferring final agreement as to the details of that agreement until after the witness has testified. The clear answer to this question must be no. In this case, the State's failure to disclose the existence of a new agreement or understanding or anticipated agreement with Mr. Wilson violated Mr. Smith's right to due process. Mr. Smith respectfully requests that this Court grant his Petition for Writ of Certiorari.

II.
THE TRIAL COURT ERRED IN PERMITTING THE STATE'S WITNESS, MICHAEL WILSON, TO TESTIFY TO THE ALLEGED OUT-OF-COURT STATEMENTS OF MR. SMITH'S FORMER ATTORNEY PERTAINING TO A BRIBE AS SUCH STATEMENTS CONSTITUTED INADMISSIBLE HEARSAY AND VIOLATED MR. SMITH'S RIGHT TO CONFRONTATION AND FAIR TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Kansas Supreme Court erroneously held that the admission of out-of-court statements by Mr. Smith's former attorney pertaining to an alleged bribe supposedly paid to a State's witness did not violate the hearsay rule or the Sixth Amendment's right to confrontation. The Kansas Supreme Court's reasoning, flawed from its inception, mischaracterizes the nature of some of the statements, ignores what is being asserted, and fails to recognize that the statements are relevant only for "the truth of the matter

asserted." The Kansas Supreme Court erroneously concluded that the statements were not hearsay because they involved the doing of a "verbal act" or were important to show only that "the statement was made."[2] In fact, defense counsel at trial objected to an entire range of statements, some of which had nothing to do with a "verbal act" and which clearly were relevant to the truth of the matter, not simply the fact that "the statement was made."

A review of the transcript reveals that Michael Wilson, the only witness to link Mr. Smith to the shooting of Julie Garrett, testified: (1) That defense counsel told him that "Dino was willing to take care of" him if he changed his statement; (2) That defense counsel asked what he had said to police; (3) That defense counsel stated Mr. Smith was willing to pay $5,000.00 to Wilson and up to $7,500.00 if he did not get bound over for trial; (4) That former defense counsel "agreed on a price" with him and then "she said okay"; and (5) That defense counsel also was "just telling me why don't I get myself together and take that money and get out of town."

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[2] The district court admitted the statements not on the basis that they did not constitute hearsay, but rather finding that they fit within the parameters of a hearsay exception, declarations against interest, under K.S.A. 60-460(j).

The statements at issue in Mr. Smith's case involve far more than the doing of a "verbal act." The statements involve a stated willingness to pay a bribe, an inquiry as to what the witness had earlier stated to police, negotiations over a price, and an encouragement to the witness to get himself "together." By no stretch of the imagination can all of these statements be characterized as "verbal acts." The statements involve past, present and possibly future behavior. Some of the statements had nothing to do with a "verbal act" and were not admissible for the purpose of showing Mr. Wilson's state of mind. The statement that "first she wanted to know what I said to police" is pure hearsay and had nothing to do with "Wilson's state of mind." The statement is relevant only to the allegation that Mr. Smith's then-attorney was engaging in illegal acts of witness tampering on his behalf.

The other alleged statements by Mr. Smith's then-attorney, which concern alleged negotiations for a bribe, also involve far more than a "verbal act" and go far beyond what is necessary to show Mr. Wilson's "state of mind." Without question, these statements go directly to the issue of guilt or innocence and therefore are hearsay. *United States v. Becker*, 230 F.3d 1224, 1229 (10th Cir. 2000).

The district court did not give any limiting instruction as to Mr. Wilson's testimony, and admitted the out-of-court statements under K.S.A. 60-460(j), which applies to declarations against interest. Thus, the jury was not instructed at all as to the limited admissibility of the evidence.

Through her attorney, Ms. Quinn invoked her Fifth Amendment right not to testify. Thus, the defense was completely deprived of an opportunity to examine a key witness.

The admission of this testimony violated Mr. Smith's right to confrontation, due process, and a fair trial. The Sixth Amendment of the United States Constitution restricts the range of admissible hearsay evidence. First, the confrontation clause requires the declarant to either be produced at trial, or be shown to be unavailable. *See*, *Ohio v. Roberts*, 448 U.S. 56 (1980). When a witness is shown to be unavailable, the confrontation clause, "reflecting its underlying purpose to augment accuracy in the fact finding process by ensuring the defendant an effective means to test at first evidence," allows the admission of such evidence only when it is "marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" *Roberts*, 448 U.S. at 65 (internal citation omitted). The out-of-court

statement is admissible only if it bears adequate "indicia of reliability." Reliability can "be inferred without more" if the evidence falls within a "firmly rooted hearsay exception." Otherwise, the evidence must be excluded unless the party offering it makes a "showing of particularized guarantees of trustworthiness." *Id.* at 66.

The statements at issue in this case were certainly uttered out-of-court and were relevant only for the truth of the matter asserted. Thus they must be analyzed under the confrontation clause. In the present case, there is nothing to indicate the "inherent trustworthiness" of Ms. Quinn's alleged out-of-court statements. In fact all evidence is to the contrary. The nature of the claimed acts - - a cash for testimony deal - - was extremely serious and certainly highly unusual. One of the parties to the alleged conversation, Michael Wilson, was an admitted liar and crack cocaine user. He undeniably anticipated gaining a great deal by reporting Quinn's alleged hearsay statements. He claimed he came forward to do "the right thing." But his statement rings hollow when one considers his track record of admitted lying, claims of perjury, and ongoing efforts to improve his own lot by offering his testimony to the party who could give him the greatest benefit. Michael Wilson's reports of Quinn's alleged statements must be regarded with the highest degree

of skepticism. The State bears the burden of establishing the "inherent trustworthiness" of Wilson's testimony and it failed to do so.

The admission of the out-of-court statements of Mr. Smith's former attorney violated his rights to confrontation, due process, and a fair trial, as guaranteed by the Sixth and Fourteenth Amendments. Mr. Smith respectfully requests that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 83,691

STATE OF KANSAS,

Appellee,

v.

DANNY D. SMITH,

Appellant.

SYLLABUS BY THE COURT

1. Hearsay is defined as an out of court statement offered to prove the truth of the matter asserted. An extrajudicial statement is inadmissible as hearsay only when offered as evidence of the truth of the matter to which it relates. If the statement is offered to show either the fact of its having been made or to prove the effect on the listener, it is admissible through the person who heard it.

2. Prosecutors are under a positive duty, independent of either a defendant's request or court order, to disclose exculpatory evidence.

3. Exculpatory evidence may include evidence bearing on the credibility of a key witness. Evidence of an agreement with the State to dismiss a charge against a prosecution witness and to recommend probation in exchange for the witness' testimony would be the type of evidence that must be disclosed to a defendant.

4. When instructions are requested by a defendant in the district court, an appellate court is required to review the evidence in the light most favorable to the

defendant. A defendant is entitled to an instruction on the law applicable to his or her theories for which there is supporting evidence.

5. Terminating a trial and declaring a mistrial are largely within the discretion of the district court. A clear showing of abuse of discretion must be made before the mistrial decision will be set aside on appeal.

6. A speedy trial issue involves a question of law, over which an appellate court has unlimited review.

7. The standard of review on a claim of insufficient evidence to support a conviction is whether, after review of all the evidence, viewed in the light most favorable to the State, an appellate court is convinced a rational fact-finder could have found the defendant guilty beyond a reasonable doubt.

8. In a drive-by shooting criminal case resulting in convictions for second-degree intentional murder and attempted second-degree murder, the record is examined and it is held the district court did not err in (1) allowing a witness for the prosecution to testify regarding an alleged agreement between the witness and defendant's former defense attorney to pay the witness to change his testimony and testify that defendant was not the shooter; (2) refusing to instruct the jury regarding unintentional second-degree murder, voluntary manslaughter, and involuntary manslaughter; (3) declaring a mistrial; (4) refusing to grant a new trial because of the State's alleged failure to disclose material evidence that would have impeached the State's primary witness; (5) denying defendant's claim that his right to a speedy trial was violated; and (6) refusing to grant a new trial based on

lack of sufficient evidence to support defendant's convictions.

Appeal from Wyandotte district court; J. DEXTER BURDETTE, judge. Opinion filed June 8, 2001. Affirmed.

Cheryl A. Pilate, of Wyrsch Hobbs Mirakian & Lee, P.C., of Kansas City, Missouri, argued the cause, and *Stephen G. Mirakian*, of the same firm, was with her on the briefs for appellant.

Michael A. Russell, assistant district attorney, argued the cause, and *Daniel Cahill*, assistant district attorney, *Nick A. Tomasic*, district attorney, and *Carla J. Stovall*, attorney general, were with him on the brief for appellee.

The opinion of the court was delivered by SIX, J.:

Defendant Danny Smith appeals his convictions for the second-degree intentional murder of Julie Garrett and attempted second-degree murder of Michael Wilson. See K.S.A. 2000 Supp. 21-3402; K.S.A. 21-3301. Smith contends on appeal that his rights to due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 1 and 10 of the Kansas Constitution Bill of Rights were violated.

The specific issues are whether the district court erred by: (1) allowing a witness for the prosecution to testify regarding an alleged agreement between the witness and Smith's former defense attorney to pay the witness to change his testimony and testify that Smith was not the shooter; (2) refusing to instruct the jury regarding unintentional second-degree murder, voluntary manslaughter, and involuntary manslaughter; (3) declaring a mistrial; (4) refusing to grant a new trial because of

the State's alleged failure to disclose material evidence that would have impeached the State's primary witness; (5) ruling that Smith's right to a speedy trial was not violated; and (6) refusing to grant a new trial based on lack of sufficient evidence to support Smith's convictions.

Our jurisdiction is under K.S.A. 22-3601(b)(1) (a conviction resulting in a life sentence receives automatic review by this court).

Finding no reversible error, we affirm.

FACTS

On the evening of September 16, 1997, Michael Wilson and Julie Garrett stood behind a pickup truck in front of a "drug house" near the corner of 14th Street and Ridge in Kansas City, Kansas. Other people were either on the porch, in the house, or standing behind the pickup truck.

Witnesses saw a van approach the area. Then, Wilson, a neighbor named Beulah Natividad, and another neighbor named Tommie McGaughy heard gunshots. Wilson testified that the gunfire came from the van. Wilson saw the driver point the gun through the open sliding door of the van. Wilson saw no one else in the van. He heard two shots, ducked down, and heard three or four more shots. He heard Garrett say, "I'm hit." As Wilson walked toward Garrett, he saw the van turn right and then head south down 14th Street. Wilson identified Danny "Dino" Smith, the defendant, as the shooter.

Natividad's house was "caty-corner" to the drug house. She was standing at her front door, with her back

to the street, when she heard the shots. She turned around and saw a maroon van, but she could not see anyone in the van. Natividad heard about seven shots, but she could not tell where they were coming from. After the first three shots, she heard a "blood curdling scream" and a female scream "Dino" or "Tino." After hearing more shots, Natividad said people were hollering, "[G]et out of here" and "[G]et the van." She saw the van drive away. (The van did not speed away.) Natividad testified that she had the impression the shots came from inside the pickup truck. After the shots, Natividad saw a man walk from the truck, enter the house, and then leave carrying a brown paper bag.

Tommy McGaughy testified that he was sleeping on the porch of a neighboring house when he heard a succession of two or three gunshots and then four or five more. He looked toward Ridge Street and saw a red minivan. McGaughy saw one person in the van, who could have been black or Hispanic. He said the driver raised his arm towards the passenger window and shot at McGaughy. McGaughy ran into the house. When he returned outside, he saw a woman lying face down in the street. When the police arrived, they found Garrett lying in the street. She died from a gunshot wound to the chest.

The State charged Smith with the second-degree murder of Garrett. He made his first appearance and was released on bond. The State filed an amended information charging Smith with the first-degree murder of Garrett and the attempted first-degree murder of Wilson. Smith was then detained in the Wyandotte County jail.

Wilson made a deal with the State to testify against Smith. However, at the preliminary hearing, Wilson changed his testimony and said the shooter was *not* Smith. He acknowledged that he had previously picked out Smith as "Dino" from a video or photographic line-up shortly after the shooting. Smith was bound over for trial.

After the preliminary hearing, Wilson was arrested in two separate cocaine cases. He sent a note to his attorney and to the prosecutor saying he wanted to cooperate. Wilson said he "had lied" and that he "wanted to make it right." He agreed to wear a "wire" and talked to Smith in the county jail. The district court excluded the recorded conversation.

After the jury was selected, the district court was informed that Wilson would testify that he failed to identify Smith at the preliminary hearing because Smith's counsel had offered to pay him to change his testimony. The district court heard Wilson's testimony outside the presence of the jury. Wilson said that he had reached an agreement with defense counsel. He was to be paid to alter his testimony. Wilson's brother allegedly picked up at least part of the money from the defense counsel's office after the preliminary hearing. Based on Wilson's testimony about the payoff, the district court found that it had no choice but to declare a mistrial.

Smith later obtained new counsel, and the trial resulting in his convictions was held in May 1999. Smith filed a denial of a speedy trial motion and a motion in limine to exclude his former defense counsel's alleged statements to Wilson. The district court denied both

motions. Smith's former counsel invoked the Fifth Amendment and did not testify.

At trial, Wilson returned to his first version of the shooting, identifying Smith as the shooter. Wilson explained that at the preliminary hearing, he had falsely denied Smith was the shooter because he had been paid by Smith's former defense attorney to change his testimony. Wilson also informed the jury of his initial deal with the State in exchange for his testimony identifying Smith as the shooter. He denied any further deals with the State.

Smith was sentenced to a life term for second-degree murder and 340 months for attempted second-degree murder, to be served consecutively.

DISCUSSION

Smith's first claim of error focuses on an abuse of discretion in denying his motion in limine and admitting a portion of Wilson's testimony. Smith argues that: (1) the admission of the alleged out-of-court statements of Smith's former counsel were hearsay, and (2) presentation of the statement through Wilson violated Smith's right to confrontation under the Sixth Amendment.

We review both a district court's decision regarding a motion in limine and the admission or exclusion of hearsay evidence under an abuse of discretion standard. *State v. Humphrey*, 267 Kan. 45, 55, 978 P.2d 264 (1999).

The district court was notified before trial that Smith's former defense counsel would assert her Fifth

Amendment right against self-incrimination and, therefore, was an unavailable witness. Wilson was allowed to testify, over a hearsay objection, regarding the former defense counsel's approach to him. The district court reasoned that Wilson's statements regarding what happened between Smith's former counsel and Wilson were declarations against interest, "a clear exception to the hearsay rule." See K.S.A. 2000 Supp. 60-460(j).

Wilson testified as follows. Smith's former defense counsel contacted him the weekend before the preliminary hearing. She asked Wilson to meet her at her office. Wilson and a friend, "Millie," drove to the office. (Wilson did not know where to find Millie at the time of trial.) Wilson went into the defense counsel's office alone. Counsel wrote on a tablet that Smith was willing to take care of Wilson if Wilson would change his statement. Counsel said Smith was willing to pay $5,000. Wilson said he wanted $10,000. They agreed that Wilson would receive $7,500 if Smith was not bound over for trial, or Wilson would receive $5,000 if Smith was bound over. Wilson received $2,500 through his brother Freddie. (Freddie did not testify at trial, but in a statement made in November 1998, he denied having anything to do with picking up money from Smith's attorney.)

Smith argues that not only were the statements hearsay, but also the district court's ruling prevented him from fully cross-examining the former defense counsel. Thus, Smith claims he was prevented from presenting a complete defense, which violated his right to confront the witnesses against him under the Sixth Amendment to the United States Constitution and Section 10 of the Kansas Constitution Bill of Rights. He also claims a denial of a

fair trial under the Fourteenth Amendment to the United States Constitution.

Smith points out that the district court must consider the reliability or truthfulness of the statement before allowing its admission under K.S.A. 2000 Supp. 60-460(j). See *State v. Johnson*, 240 Kan. 326, 330, 729 P.2d 1169 (1986), *cert. denied* 481 U.S. 1071 (1987).

He contends that the district court erred by failing to make a specific finding of truthfulness. However, it is well-established that " '[r]eliability can be inferred where the evidence falls within a firmly rooted hearsay exception. If the evidence does not fall within a firmly rooted hearsay exception, the evidence must be excluded absent a showing of particularized guarantees of trustworthiness. [Citation omitted.]' " *Humphrey*, 267 Kan. at 55-56. The State relies on *State v. Bird*, 238 Kan. 160, 708 P.2d 946 (1985), where Bird was prosecuted for the solicitation of the murder of his secretary's husband.

During trial, the district court allowed a witness to testify concerning statements made to her by Bird's secretary concerning the secretary's "affair" with Bird. The secretary had invoked her right against self-incrimination and refused to testify. The witness testified that the secretary told her tales of her relationship with Bird and requested the witness to "cover" for her with the husband of the witness. We noted in approving the statements' admission that the secretary's statements were not a confession; rather, they showed motive and did not directly implicate Bird in the crime charged. 238 Kan. at 174. The State contends that the statements here, like the situation in *Bird*, were not a coconspirator's confession

and, thus, were not inherently unreliable. Here, however, the district court did not make a specific finding regarding the reliability of the proffered statements. The State argues, in the alternative, that Smith's former counsel's statements were admissible as adoptive admissions or vicarious admissions. See K.S.A. 2000 Supp. 60-460(h) and (i). The district court rejected this argument, finding no evidence was presented that Smith authorized the alleged bribe.

We find no reversible error in admitting Wilson's testimony. In our view, the testimony was not hearsay. We begin our analysis by examining the record of the chambers conference on the motion in limine. The district court was confronted with a remarkable turn of events. The State had subpoenaed Smith's former attorney who had indicated that she would invoke her Fifth Amendment rights. What was the State's purpose in pursuing the change in Wilson's testimony? The prosecutor said:

"MR. CAHILL: Well, Judge, what I'm offering these statements for and all of these including what I want to do over the defendant's statements for is to explain Mr. Wilson's prior testimony. See, here's – here's how I envision it happening. Mr. Wilson will get up on the stand and say, you know, that he was there when the shots happened, who fired the shots that hit Ms. Garrett and then he will name the defendant Danny Smith, that guy right there.

"Imagine that some point in his cross-examination, Mr. Duma's (defense counsel) gonna say, let's look at your preliminary hearing. What did you say at preliminary hearing? Well, I said that that was not him. Okay.

You know, at that point, that's almost a sit down and shut up question, great answer, I'll go sit down. *Now I've got to come up here and say, Michael, why did you testify thusly?*

"THE COURT: Um-hum.

"MR. CAHILL: And why did you say that? *So really what I'm offering these statements for is to explain his prior testimony and* – and basically to – to rehabilitate, although it's not even a rehabilitation, *but merely an explanation of his prior testimony.*" (Emphasis added.)

Wilson's testimony was not introduced to prove the truth of the matter asserted, but rather to explain Wilson's reason for changing his testimony. The truth of the alleged actions of Smith's former attorney was not the question. The question was the effect of those actions upon Wilson.

Testimony not admitted to prove the truth of the matter asserted by an out of court declarant is not hearsay. The admission of such testimony does not violate the Confrontation Clause. *State v. Ninci*, 262 Kan. 21, 52, 936 P.2d 1364 (1997).

In *State v. Getz*, 250 Kan. 560, 830 P.2d 5 (1992), Vicky Getz was convicted of felony theft of two horses valued at over $500. Getz unsuccessfully defended on the basis that she was selling the horses for Perry Patton, who had been living with Getz for about a month. Patton disappeared before trial. Getz sought permission to testify that Patton told her he had purchased the two horses and had asked her to help in selling them. Getz claimed that the testimony would not be hearsay because it was not being offered to prove whether Patton had purchased the

horses, it was being offered to show Getz' state of mind. The district court excluded the evidence and a proffer was made at trial. We agreed with the Court of Appeals that the district court had erroneously excluded the proffered testimony. Getz' testimony was not offered to prove the truth of the matter, *i.e.*, whether or not Patton had bought the horses. The evidence was of a verbal act that Patton had stated that he had purchased the horses. Patton's statement was relevant to the question of Getz' intent. All relevant evidence is admissible. K.S.A. 60-407(f). We held in *Getz* that the error in excluding the evidence was not harmless because if it had been admitted the jury could have reached a different result. 250 Kan. at 570.

In *State v. McClain*, 220 Kan. 80, 81, 551 P.2d 806 (1976), we held that a police officer, Davis, was properly permitted to testify over the objection of defendant McClain that another police officer, Meyer, had advised McClain of his rights by reading the *Miranda* warning "as printed on our blue card." Davis testified fully as to the rights covered in the warning and that McClain had said to Davis and Meyer that he understood those rights. McClain objected to Davis' testimony concerning the advice of rights because it was hearsay. We observed that hearsay is defined in 60-460 as an out of court statement offered to prove the truth of the matter asserted and stated:

"2 Wharton's Criminal Evidence (13th Ed.) § 274, states the rule as follows:

'An extrajudicial statement is inadmissible as hearsay only when offered as evidence of the truth of the matter

to which it relates. If the statement is offered merely to show the fact of its having been made, it is admissible through the person who heard it. . . . '

"6 Wigmore on Evidence (3d Ed.) § 1766, states:

' . . . The essence of the Hearsay rule is the distinction between the testimonial (or assertive) use of human utterances and their nontestimonial use.

'The theory of the Hearsay rule . . . is that, when a human utterance is offered as evidence of the truth of the fact asserted in it, the credit of the assertor becomes the basis of our inference, and therefore the assertion can be received only when made upon the stand, subject to the test of cross-examination. If, therefore, an extrajudicial utterance is offered, not as an assertion to evidence the matter asserted, but without reference to the truth of the matter asserted, the Hearsay rule does not apply. . . . '

"And, see, 2 Jones on Evidence (6th Ed.) § 8.6 which gives the following explanation:

'If a statement previously made out of court is offered in evidence through a witness . . . not for the purpose of establishing the truth of the matter stated, but merely for the purpose of establishing the fact that the statement was made, the evidence is admissible, if it is relevant, and it is not subject to the exclusionary impact of the hearsay rule.'

'One prominent class of such statements [is] often referred to as verbal acts. . . . '

"In *State v. Rhoten,* 174 Kan. 394, 400, 157 P.2d 141, we held that the testimony of an officer that he heard statements such as 'Place your bets' and 'New man shooting'

emanating from a building in which it was alleged that a dice game was in progress was not hearsay but was original evidence, under the rule set forth in § 1766 of Wigmore, supra.

"Clearly the state was not attempting to prove the truth of the matter stated, viz., the *Miranda* warnings. The evidence was offered for the purpose of establishing that the warnings were stated and explained to the defendant prior to the interview. The witness heard the warnings read and he may say so." 220 Kan. at 81-82.

In *State v. Belt*, 6 Kan. App. 2d 585, 591, 631 P.2d 674, *rev. denied* 230 Kan. 819 (1981), the Court of Appeals reversed an arson conviction based on error in excluding out of court statements as hearsay. The district court did not admit conversations that two defense witnesses had with an unknown white male the night of the fire in the building where the fire occurred. Apparently, the unknown declarant had approached the witnesses and said either "Are you going to stay around and watch the fire department?" or "Are you going to stay around and watch the fire?" 6 Kan. App. 2d at 588. Both witnesses, in their offer of proof, testified that the statement was made by a dark-complected man dressed in a green army fatigue jacket and blue stocking cap, who was acting weird, like a "wild man." Both testified in the proffer that the declarant was not Belt. The *Belt* court concluded: "The declarant's statement was offered only to prove that the statement was made. It was not offered to prove that the declarant was waiting around in the bar because he knew a fire would start in the building in a few hours." 6 Kan. App. 2d at 589; see *State v. Hernandez*, 170 Ariz. 301, 306, 823 P.2d 1309 (1991). In *Hernandez*, a witness testified that

he had heard an unknown person say that unnamed "others" were going to beat up the victim. The testimony was objected to as hearsay. The offered testimony was not hearsay. The extrajudicial utterance was not offered as proof of the matter asserted. The court noted that words offered to prove the effect on the listener are admissible when they are offered to show their effect on those whose conduct is at issue. The court held that the truth of the statements was not the question; it was their effect upon the listener. We agree with the reasoning in *Hernandez.*

The preferred procedure for the district court when admitting an out of court statement that is not being offered to prove the truth of the matter asserted is to inform the jury of the limited purpose for admission. Here, the district court did not do so. Wilson's testimony came in under K.S.A. 2000 Supp. 60-460(j) as a hearsay exception. However, the district court was right for the wrong reason. See *State v. Wilburn,* 249 Kan. 678, 686, 822 P.2d 609 (1991).

The admission of Wilson's testimony was not reversible error.

Failure to Disclose Exculpatory Evidence

According to Smith, the State failed to disclose evidence that it had made a deal with Wilson to dismiss one of his cocaine charges and to recommend probation on the other charge in exchange for Wilson's testimony against Smith.

Prosecutors are under a positive duty, independent of either a defendant's request or court order, to disclose

exculpatory evidence. *State v. Wilkins*, 269 Kan. 39, 42, 5 P.3d 520 (2000). Smith filed pretrial motions in which he requested all exculpatory information. Exculpatory evidence " 'tends to disprove a fact in issue which is material to guilt or punishment' of a defendant." *State v. Nuessen*, 23 Kan. App. 2d 456, 461, 933 P.2d 155 (1997) (quoting *State v. Carmichael*, 240 Kan. 149, 153, 727 P.2d 918 [1986]). Exculpatory evidence may include evidence bearing on the credibility of a key witness. 23 Kan. App. 2d at 461. Smith correctly points out that evidence of an agreement with the State to dismiss a charge against a prosecution witness and to recommend probation in exchange for the witness' testimony would be the type of evidence that must be disclosed to a defendant. See *Wilkins*, 269 Kan. at 42.

If there was a second deal between Smith and the State, there is no question but that the evidence would be exculpatory. It bore on the credibility of Wilson, the key witness. It was also material. However, Smith fails to show that Wilson made a second deal with the State before he testified against Smith at the trial. In his trial testimony, Wilson denied that he had been offered a deal on his two new cocaine charges, and he said he did not expect to get a deal after Smith's trial was over. Under vigorous cross-examination concerning his initial grant of immunity and agreement to cooperate, he acknowledged the possibility of favorable consideration in his pending cases, but when he was asked, "Have you been offered any new deal whatsoever?," on redirect, Wilson replied, "No." During a bench conference, the prosecutor told the court, "There has been no deal [after the preliminary hearing testimony] and there will not be any deal." The

prosecutor informed the jury that Wilson was testifying for the State as a condition of the original agreement with the State made *before* the preliminary hearing. The jury was instructed:

"In evaluating the testimony of Michael Wilson, you may consider the fact that he received a benefit from the State for his testimony. You should consider the testimony with caution unless it is supported by other evidence."

Two months after Smith's trial, Wilson pled guilty to one cocaine charge and a misdemeanor charge of possession of drug paraphernalia under a plea agreement (a second cocaine charge was dismissed, and the State agreed to recommend probation). On August 11, 1999, after Smith was tried and sentenced, Wilson appeared for sentencing. As recommended by the State, the district court ordered probation, which the judge characterized as "one very large break." The State said it recommended probation because Wilson had been a "key witness" in a murder trial and had "cooperate[d] fully" with the State.

We conclude that the record does not support a new deal with Wilson arising from his cocaine charges in exchange for his testimony. The State suggests that if there was any new agreement, it must have been struck with Wilson *after* Smith's trial. It appears that Wilson came forward on his own and testified in hopes of obtaining leniency in the future. However, there is no evidence that he reached a new agreement with the State to recommend leniency before trial. There was no new deal to disclose and, thus, no error.

Lesser Included Offense Instructions

Next, Smith argues that the district court erred by refusing to instruct the jury on unintentional second-degree murder, voluntary manslaughter, and involuntary manslaughter as lesser included offenses of intentional second-degree murder. Smith's contention lacks merit.

Because Smith requested these instructions, we are required to view the evidence in the light most favorable to him. He was entitled to an instruction on the law applicable to his theories for which there was supporting evidence. See *State v. Sims*, 265 Kan. 166, 168, 960 P.2d 1271 (1998). The district court found that the evidence did not support these instructions. We agree. There is "[n]o duty to instruct the jury on a lesser included offense . . . where the evidence as a whole, viewed in the light most favorable to the defendant, could not reasonably support a jury verdict on the lesser included offense." *State v. Simkins*, 269 Kan. 84, 90, 3 P.3d 1274 (2000).

Unintentional second-degree murder, or "depraved-heart" murder, K.S.A. 2000 Supp. 21-3402(b), requires "the killing of a human being committed: . . . unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life." See *State v. Robinson*, 261 Kan. 865, Syl. ¶ 5, 934 P.2d 38 (1997).

Involuntary manslaughter is the unintentional killing of a human being committed "recklessly." K.S.A. 2000 Supp. 21-3404(a).

Smith argues that McGaughy's testimony showed that the shooter may have: (a) been firing randomly into

the neighborhood, rather than specifically at Garrett, or (b) been merely shooting recklessly at random, justifying either an unintentional second-degree murder instruction or an involuntary manslaughter instruction.

The State counters with *State v. Jackson*, 262 Kan. 119, 936 P.2d 761 (1997). Jackson was convicted of two counts of first-degree murder and other charges. He shot and killed two people in a nightclub. On appeal, he argued that the district court erred in failing to instruct the jury regarding involuntary manslaughter. Jackson relied on the testimony of a witness who testified that the second victim was shot as he ran by Jackson after Jackson had shot the first victim. Jackson argued that the second victim may have been killed by a random shot. We rejected this argument, noting that the witness never testified that Jackson shot randomly. Moreover, the witness testified that he could not tell where or at what Jackson was shooting. 262 Kan. at 125.

McGaughy did not testify that Smith shot randomly. He testified that Smith shot at him. The facts here are similar to those in *Jackson*. The district court did not err in refusing to give an instruction on unintentional second-degree murder or involuntary manslaughter.

Smith also argues that the district court should have given an instruction on voluntary manslaughter under the theory of a sudden quarrel. Smith bases this upon the fact that Wilson testified that 2 1/2 or 3 months before the shooting, he and Smith had a dispute over a drug deal. Wilson said Smith tried to cheat him by giving him less crack cocaine than he had bargained and paid for. Wilson said he drew out his pistol and took from Smith the full

quantity of drugs and the money Wilson had given him. Wilson testified that right after the incident, Smith called him. Their conversation was "not friendly." Smith said he was "gonna burn the house down." Wilson offered to return Smith's drugs. Although Wilson saw him at different places, he had no more contact with Smith until the shooting.

We have said: "An intentional killing is not done in the heat of passion if sufficient time has elapsed between the provocation and the killing for an ordinary person to regain reason." *State v. Follin*, 263 Kan. 28, Syl. ¶ 3, 947 P.2d 8 (1997) (finding no error in failing to give a voluntary manslaughter instruction where about 10 hours had passed between the alleged provocation and the killings). The district court did not err in refusing to give a voluntary manslaughter instruction.

The Mistrial

After the district court was made aware of the allegations that Smith's counsel was allegedly involved in a payoff with Wilson, a mistrial was declared. Smith contends that the declaration of a mistrial violated the prohibition against double jeopardy under the Fifth and Fourteenth Amendments to the United States Constitution and Section 10 of the Kansas Constitution Bill of Rights. We disagree. Terminating a trial and declaring a mistrial are largely within the discretion of the district court. A clear showing of abuse of discretion must be made before the mistrial decision will be set aside on appeal. *State v. Williams*, 268 Kan. 1, 8, 988 P.2d 722 (1999).

On November 2, 1998, Smith's case was set for trial. The parties appeared, and the defense filed a motion in limine that mentioned allegations that "someone" was involved in a payoff with Wilson. Defense counsel told the court that she learned of the allegations through her own investigation the Saturday before Smith's trial was to begin. The district court found that it had no choice but to declare a mistrial and did so. Defense counsel objected, saying that the court should simply exclude Wilson's testimony about the alleged deal. The district court overruled the objection and told defense counsel that she should remove herself from the case.

Smith argues that the State may have learned of the payoff allegations as much as 2 months before trial, when Wilson contacted police about wanting to recant his testimony from the preliminary hearing. He contends that the declaration of a mistrial was reasonably foreseeable to the State and that the State could have continued the case to allow additional investigation before the jury was sworn.

Smith's new attorney filed a motion to dismiss the second trial, arguing that "various mechanisms existed to prohibit such prejudice [to Smith] before jeopardy actually attached." The district court denied the motion to dismiss and said it had not been adequately informed of the nature of Wilson's testimony before jury selection for the first trial. The trial judge was presented with a novel, sudden, and perplexing turn of events. The district court found it had been necessary to declare a mistrial and that "manifest necessity" was a discretionary decision.

We have recognized the doctrine of manifest necessity. In *State v. Bates*, 226 Kan. 277, 283, 597 P.2d 646 (1979), we said:

"Even when a mistrial is declared without the consent of the defendant or upon his motion, a retrial is still constitutionally permissible if the judge exercised sound discretion in determining justice required a mistrial. [Citation omitted.] The test to be applied in assessing the judge's discretion in declaring a mistrial and discharging the jury from giving a verdict is whether there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. [Citation omitted.]"

Smith correctly points out that "if the prosecutor's misconduct was intentional and substantially prejudiced the defendant's right to a fair trial, double jeopardy would prohibit a new trial." *State v. McClanahan*, 259 Kan. 86, 101, 910 P.2d 193 (1996). Here, the State acknowledged that Wilson made the allegations "sometime" before trial. The prosecutor said,

"I think when we are dealing with something this serious we have an obligation before we take bare allegations and make them into criminal charges or whatever they are going to become to fully investigate these charges. I don't think that I could in good conscious *[sic]* spread these facts, talk about what Mr. Wilson alleged without doing some investigation, so we are involved in doing that. . . . I was not certain how I was going to handle [Wilson's] testimony at trial when it came up. If I thought that it was going to cause a mistrial, if I thought it was foreseeable that that would happen, chances are and it would have been my fault, I wouldn't have elicited

that testimony without at least first bringing it to the Court's attention during that trial. . . . "

The State also argues that asking for a continuance in order to further investigate would have violated Smith's right to a speedy trial. The State was placed in a difficult position since Smith's attorney, the opposing counsel, had allegedly tampered with a witness. When the defense brought to the court's attention a general allegation of witness tampering before trial, the district court decided to first impanel the jury. It does not appear that the State intentionally caused a mistrial. Once it was apparent to the district court that allegations would, in fact, surface concerning defense counsel, a discretionary call based on manifest necessity was made by the district court. There was no abuse of discretion.

A Speedy Trial

Smith contends that his statutory and constitutional rights to a speedy trial were violated. We disagree. This issue involves a question of law, over which we have unlimited review. See *State v. Hines*, 269 Kan. 698, 698, 7 P.3d 1237 (2000).

The district court declared a mistrial on November 3, 1998. Smith's case appeared on the docket in February 1999, when it was again set for trial. Pretrial issues were addressed on that date, and, with the consent of both counsel, the case was continued until May 3, 1999. Smith acknowledges that because he agreed to the continuance from February 22 to May 3, he cannot complain about that delay. However, he argues that the delay between

November 3 and February 22, totaling 111 days, violated his 22-3402 statutory right to a speedy trial.

The district court reasoned that Smith had caused some of the delay by filing a motion to recuse the judge. It noted that about 74 days passed between the time Smith filed the motion to recuse and the time the motion was ruled upon. The district court found such a time frame "patently unreasonable" and did not tax all of that time to Smith. However, the district court found that a delay of up to 30 days was reasonable when "there is a pending motion to be heard." It concluded that under 22-3402(2), 30 days was a reasonable time to take to process Smith's motions and charged 30 days to Smith. The district court observed that Smith was also being held on a federal charge and, therefore, he was not detained "solely" on the murder charges. Thus, the 180-day period would have applied, rather than the 90-day period under 22-3402.

Smith acknowledges that a federal detainer was filed against him. However, he points out that although his attorney had appeared, he personally had not appeared in federal court on the charge. Smith concludes that he was being held solely on the state murder charges. In *State v. Hill*, 257 Kan. 774, 895 P.2d 1238 (1995), we found that a parole detainer is sufficient to remove a defendant's case from the 90-day period of 22-3402(1). Here, Smith's counsel acknowledged that even if Smith had been released on bond in the state case, "the sheriff would not release him because he would have a hold on him from the detainer on him from the federal case." Thus, substantial competent evidence supports the district court's finding that 22-3402(1) (90-day period) was

not applicable. Here, a 30-day delay was attributed to the consideration of Smith's motion to recuse. Smith fails to show that this length of time was unreasonable. See *State v. Southard*, 261 Kan. 744, 748, 933 P.2d 730 (1997) (a 28-day delay was reasonably charged to the defendant based on his filing a motion to suppress).

Smith also argues his right to a speedy trial under the Sixth Amendment to the United States Constitution has been violated. In *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972), more than 5 years passed between Barker's arrest and his trial. We have adopted the *Barker* four-point analysis and have held that a delay of a little over a year between arrest and trial is not clearly presumptively prejudicial. *Hill*, 257 Kan. at 778-79; *State v. Goss*, 245 Kan. 189, 193, 777 P.2d 781 (1989). Here, less than 4 months elapsed between Smith's mistrial and trial. Thus, the length of delay is not clearly presumptively prejudicial. There is no necessity to inquire into the other factors in the balancing test. Smith's constitutional speedy trial rights were not violated.

Sufficiency of the Evidence

Last, Smith argues that there was insufficient evidence to support his convictions. We disagree.

Our standard of review is whether, after review of all the evidence, viewed in the light most favorable to the State, we are convinced a rational factfinder could have found Smith guilty beyond a reasonable doubt. See *State v. Mason*, 268 Kan. 37, 39, 986 P.2d 387 (1999).

Smith does not attack the evidence supporting his convictions; rather, he attacks Wilson's credibility. He argues that Wilson's testimony "must be discounted not only because he was an admitted liar and perjurer, but also because he received substantial benefits for testifying and those benefits were never fully revealed to the jury." Wilson's alleged deal with the State in exchange for his trial testimony has been discussed in our opinion. The jury was instructed that it should consider Wilson's testimony with caution unless supported by other evidence and that it may consider Wilson's received benefit from the State for his testimony. As for Wilson's credibility, we do not reweigh the evidence or pass on the credibility of witnesses. *State v. Orr*, 262 Kan. 312, 322, 940 P.2d 42 (1997).

Affirmed.

IN THE DISTRICT COURT OF
WYANDOTTE COUNTY, KANSAS

DIVISION 9

STATE OF KANSAS,	)	
Plaintiff,	)	
vs.	)	Case No. 97CR1868
DANNY D. SMITH	)	
Defendant.	)	

TRANSCRIPT OF JURY TRIAL

PROCEEDINGS had before the Honorable J. Dexter Burdette, Judge of Division 9 of the District Court of Wyandotte County, Kansas, and a jury of 12, at Kansas City, Kansas, on the 4-7 days of May, 1999.

APPEARANCES:

The plaintiff, State of Kansas, appeared by Mr. Daniel Cahill, Assistant District Attorney, 710 N. 7th, Kansas City, Kansas 66101.

The defendant, Danny D. Smith, appeared in person and by Mr. John M. Duma, Attorney-at-Law, 831 Armstrong, Kansas City, Kansas 66101.

* * *

[31] was the attempted robbery that they closed two days after this deal.

THE COURT: I understand, but if you believe what the State has told us to this point, that was not a part of his deal, only this. And you are allowed to say this –

MR. DUMA: Okay.

THE COURT: – but not that.

MR. DUMA: Okay.

THE COURT: I'm gonna sustain the objection.

MR. DUMA: Okay.

THE COURT: And then we're gonna go on with this. I'm also gonna admonish the jury that what you folks are telling them is not evidence.

MR. CAHILL: My big problem about this, Judge, is this stuff about the deal after preliminary hearing testimony. There has been no deal and there will not be any deal.

MR. DUMA: Well, I'll cross-examine Mr. Wilson on that, okay.

THE COURT: We will let the jury make the final determination, but based upon what the State has told us so far are the facts there was no new deal after negotiating between the State and Mr. Wilson after the preliminary hearing.

[32] MR. DUMA: But – okay.

THE COURT: There's no new deal.

MR. DUMA: As a part of this deal, he still has to testify to this set of facts. He can't change his testimony for – from this set of facts.

THE COURT: True.

MR. CAHILL: His testimony has to be the truth. That's what his deal was.

MR. DUMA: That's not what this says.

THE COURT: He must testify pretty much as he indicated in his police statement immediately after the crime.

MR. DUMA: They actually said this is what he has to say in the deal. That's what I'm getting at.

THE COURT: Okay. Well, if that's your belief, that's fine. Like I said, this is not evidence.

MR. DUMA: Right.

THE COURT: And I'm gonna tell them it's not evidence, but I'm also gonna tell them that based upon the agreement between you folks, everything I've seen and heard, there was no new deal bargained between the State and Mr. Wilson after the preliminary hearing. And I think your – you gave them that impression.

[33] MR. DUMA: Okay.

THE COURT: Okay.

(Thereafter, the following proceedings continued in the hearing of the jury.)

THE COURT: We're trying out a little technology here also and I don't know how effective that is. They have to talk into that, but then she's wearing earphones, she has to listen to it and we're trying to stay quiet here. In any event, I'm sustaining the objection of the State. It's my understanding that no new deal was brokered between the State and Mr. Wilson after the preliminary hearing. I also need to tell you, as I will throughout this trial, that what these fellahs are telling you is not evidence. It's what they expect their evidence will show. You

folks are the only ones who are going to determine what the actual evidence in this case is by testimony from the witness stand. You may proceed, sir.

MR. DUMA: Your Honor, thank you. As a condition of the original deal that Michael Wilson made – and I'm gonna – we're gonna admit that as evidence. I'm gonna offer that as an exhibit – you will see the sort of punishment that he escaped as a result of him testifying for the State in this

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IN THE DISTRICT COURT OF
WYANDOTTE COUNTY, KANSAS
DIVISION SIXTEEN

STATE OF KANSAS,	)	
Plaintiff,	)	
vs.	)	Case No. 98 CR 1560
MICHAEL E. WILSON,	)	
Defendant.	)	

TRANSCRIPT OF SENTENCING

PROCEEDINGS had before the Honorable Thomas L. Boeding, Judge of Division Sixteen of the District Court of Wyandotte County, Kansas, at Kansas City, Kansas, on the 11th day of August, 1999.

APPEARANCES:

The plaintiff, STATE OF KANSAS, appeared by Mr. Daniel Cahill, Assistant District Attorney, Wyandotte County Courthouse, District Attorney's Office, 710 North 7th Street, Kansas City, Kansas 66101.

The defendant, MICHAEL E. WILSON, appeared in person and by Mr. James F. Foster, Attorney at Law, 220 Brotherhood Bldg., Kansas City, Kansas 66101.

TINA R. ST. JOHN
Registered Professional Reporter
Wyandotte County Courthouse
Kansas City, Kansas

* * *

[6] MR. CAHILL: Correct. Judge, I don't know if it was or not. Here's the problem. The PSI doesn't talk about him being on probation for the other case which he, in fact, he was. That case was the aggravated failure to appear, which appears at the top at 97-2259. So he had 11 months to do on that at the time he went in. He was picked up both on the warrant for this case and for a bench warrant on the probation violation. So –

THE COURT: So everyone agrees then that the sentence that's imposed in this case bar today is mandatorily consecutive to 97 CR 2259?

MR. FOSTER: That's correct.

MR. CAHILL: Yes, Your Honor.

THE COURT: Neither of you have to address this question, but I'm going to give you an opportunity to. This Court firmly believes that Mr. Wilson committed perjury when he testified in this court the last time on the preliminary hearing in that other matter. And obviously the integrity of the court system is something that's very important, and I'm tossing that out there, I'm just telling you that's what I think. Does anyone want to comment on that at all?

MR. CAHILL: Well, Judge, as you probably [7] remember, I was quite upset with Mr. Wilson and his actions on that date as well. He picked up – he was picked up on new charges, Judge, and at that time I had no real interest in speaking with Mr. Wilson, dealing with him whatsoever. He persisted through his attorney to contact me and came forward with this information, Judge. And at the time I don't think he was acting solely

because of these – the cases that were pending against him, but he did at that point cooperate fully with the State. He conceded to all our demands of a lie detector test and things like that. He did things for the State such as discuss with one of the criminal defendants the circumstance –

THE COURT: You don't need to go into details. I think you've basically answered –

MR. CAHILL: Okay. What I guess I would say he almost went what I would consider above and beyond what he had to do to remedy what I think he realizes was a particularly heinous thing he did in perjuring himself.

MR. FOSTER: That's correct. He apologized to the Court also for that; isn't that correct?

THE DEFENDANT: Yes.

THE COURT: Mr. Wilson, is there anything more

* * *

IN THE DISTRICT COURT OF
WYANDOTTE COUNTY, KANSAS

DIVISION 9

STATE OF KANSAS, Plaintiff,	)	
vs.	)	Case No. 97CR1868
DANNY D. SMITH, Defendant.	)	

TRANSCRIPT OF JURY TRIAL

PROCEEDINGS had before the Honorable J. Dexter Burdette, Judge of Division 9 of the District Court of Wyandotte County, Kansas, and a jury of 12, at Kansas City, Kansas, on the 4-7 days of May, 1999.

APPEARANCES:

The plaintiff, State of Kansas, appeared by Mr. Daniel Cahill, Assistant District Attorney, 710 N. 7th, Kansas City, Kansas 66101.

The defendant, Danny D. Smith, appeared in person and by Mr. John M. Duma, Attorney-at-Law, 831 Armstrong, Kansas City, Kansas 66101.

* * *

[7] testimony, I don't have to go over the hearsay to say why he feared for peoples' safety. I don't have to broach that question. He can just say that he was in fear for – for his friends' safety without – in fact, I planned on asking him that without broaching any hearsay statements, Judge. So I don't see how that really has any bearing on

what he's gonna testify about the transactions between Ms. Quinn and himself.

As the Court said, there are reasonable inferences to be drawn from that that support both the State's case and the defense case and I think that they can – we can get down that's why this case is in dispute, Judge, 'cause we have different looks at this. So I don't see anything different from when the Court ruled earlier.

THE COURT: There's only one reason to get Ms. Quinn's testimony into evidence in this case and that's for the State to try and show that this action can somehow be connected to the defendant. And much like flight after a crime has been committed or cutting up a body and disposing of its parts can be used to show that somebody did, in fact, commit the crime charged. That's the only reason to bring Ms. Quinn's supposed negotiations [8] with Michael Wilson for changing his preliminary hearing testimony into evidence. There's only one beneficiary of Mr. Wilson changing his testimony at preliminary hearing and that's to the defendant.

Now, I think it is a reasonable inference that the only reason those negotiations were entered into were on the behalf of the defendant. In this Court's opinion, that's reasonable. I understand defense counsel's position. I can appreciate it, but I don't necessarily agree with it. Ruling stands. It's a declaration against interest and you will be allowed to get into it in your case in chief. Anything further from either side?

MR. CAHILL: Judge, just one – I think we need to place on the record, and I'm not sure if Mr. Duma did this to start with, Ms. Quinn was here yesterday, stated

that she would follow her counsel's recommendation as far as pleading whether to take the Fifth Amendment or not. Mr. Cornwell was here in court earlier today. He indicated to both counsel and I believe the Court that that, in fact, was his instructions, that's what his client would do. So just for the record so we don't have to go through the formality of calling her – getting a jury out of here, calling her and having [9] her actually take the Fifth, I think all parties can stipulate that she would, in fact, take the Fifth if she was called.

THE COURT: All parties should and certainly the Court is on notice from her counsel, Mr. Cornwell, that should she be called as a witness in this case, she would take the Fifth Amendment. I believe that's the defendant's understanding and I know that's the State's understanding, therefore, it would be improper to call her either side knowing that that would be the answer to any direct question about this case. That's on the record and I think that's clear. Anything else we need?

MR. CAHILL: No, Judge.

MR. DUMA: Thank you, Your Honor.

THE COURT: Are you gonna give us your opening now or –

MR. DUMA: Yes –

THE COURT: – are you gonna reserve it?

MR. DUMA: – I'm gonna do that.

THE COURT: We are ready then.

(The jury returned to the courtroom, after which the following proceedings were had.)

THE COURT: Let the record reflect the jury is present as well as the defendant and both counsel.

* * *

IN THE DISTRICT COURT OF
WYANDOTTE COUNTY, KANSAS
DIVISION 9

STATE OF KANSAS,	)	
Plaintiff,	)	
vs.	)	Case No. 97CR1868
DANNY SMITH,	)	
Defendant.	)	

TRANSCRIPT OF JURY TRIAL TESTIMONY OF
MICHAEL EUGENE WILSON

PROCEEDINGS had before the Honorable J. Dexter Burdette, Judge of Division 9 of the District Court of Wyandotte County, Kansas, at Kansas City, Kansas, on the 4-7 days of May, 1999.

APPEARANCES:

The plaintiff, State of Kansas, appeared by Mr. Daniel Cahill, Assistant District Attorney, 710 N. 7th, Kansas City, Kansas 66101.

The defendant, Danny Smith, appeared in person and by Mr. John M. Duma, Attorney at Law, 831 Armstrong Avenue, Kansas City, Kansas 66101.

* * *

[39] you still - did you still have contact with Ms. Quinn on a regular basis at that time?

A She contacted me and we talked and she was telling me that -

MR. DUMA: Your Honor, I need to again for the record state my objections as previously.

THE COURT: Same ruling, sir.

MR. DUMA: Thank you.

Q (By Mr. Cahill) Michael, you said she contacted you. How did she contact you?

A She – she kept – she – several different ways she tried to get in touch with me, but I think she finally got to me through my brother.

Q Okay. Now, when you first talked to her on the phone, when – when was this in relation to the preliminary hearing?

A The – the weekend before.

Q Okay.

A Friday.

Q And September 16th or – I'm sorry – August 12th of '98 was a Monday, correct?

A Yes.

Q All right.

A It was on a Monday.

Q So where were you when you had this phone

* * *

SUPREME COURT ORDER DISTRICT CASE NO. 97CR1868

IN THE SUPREME COURT

OF THE STATE OF KANSAS

CHERYL A PILATE
WYRSCH HOBBS MIRAKIAN & LEE
1101 WALNUT STE 1300
KANSAS CITY MO 64106

CASE NO. 99-83691-S

STATE OF KANSAS, APPELLEE,
V
DANNY D. SMITH, APPELLANT.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR REHEARING OR MODIFICATION BY DANNY D. SMITH.

CONSIDERED BY THE COURT AND DENIED.

DATE: 07/12/2001.

CAROL G. GREEN
CLERK